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The ADR Newsletter

Alternative Dispute Resolution Section of the State Bar of Michigan

Toward a Litigator's Philosophy of ADR

— by James J. Vlasic

If you view the civil litigation system in the United States, in both state and federal courts, from 50,000 ft., you may come to the conclusion that its core purpose is to resolve disputes without force or violence. In the simplest sense, instead of "Annie Get Your Gun" or "the Mafia approach" the courts provide a series of procedures that result in an adjudication, and then a series of appellate procedures which render that adjudication final, socially acceptable, and enforceable in American society.

Philosophy

The desired result of engaging the civil litigation process is the resolution of a dispute. The litigation process provides an exchange of information about historic facts, which information is then argued to be consistent or inconsistent with existing law. One or more adjudicators then determine whether the information produced is credible, and if so, whether the application of the law to that information requires remedial action. It is hoped that the litigation process is of sufficient quality that the resolution will be a fair one. It is likewise hoped that the efficiency of the litigation process will be such that the result will be obtained within an acceptable amount of time and at an acceptable cost. These three parameters, fairness, time, and cost, are the parameters that a litigant engaging the process, or being subjected to the process, will use to gauge its effectiveness.

> ***"[I]t is often the case that deficiencies in fairness, time, or cost of the litigation process can only be avoided by disengaging from established litigation procedures, in favor of pursuing alternative methods of dispute resolution."***

Too often, participants in the litigation process rate its success to be low in one or more of the vital parameters of fairness, time or cost. Often this disappointment with the process results from the participants in the process losing their focus on the goal; which is to say, the resolution of the dispute. Instead, they devote inefficient amounts of time and resources to the process, as an end in itself, without continuously re-evaluating whether, by doing so, they are approaching the resolution of the dispute in the most efficient manner possible. The result of this loss of focus (intentional or unintentional) can be excessive, but unnecessary, discovery and motion practice, prolonged trials, and unproductive appeals. Forced delay or increased cost in a conflict resolution procedure may be wielded as a weapon by the party with more resources against the party with fewer resources. Nonetheless, delay and transactional costs represent a real economic burden to both parties.

The civil court process is necessarily procedurally rigid, because it is both adversarial and coercive. In the end, an adjudication is binding, not because it is consensual, but because it is enforced by the state or federal government upon completion of the process. Because of the procedural rigidity of the process, during most stages any party to it can require a greater or lesser degree of diligence to be applied, no matter

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how unproductive that diligence may be of a final resolution. As a result, it is often the case that deficiencies in fairness, time or cost of the litigation process can only be avoided by disengaging from established litigation procedures, in favor of pursuing alternative methods of dispute resolution. These alternative methods can be as simple as opposing litigation counsel negotiating the scope of discovery, or negotiating the resolution of a discovery dispute during a pending lawsuit, rather than submitting those disputes for adjudication by the court. They can be removed from the litigation process by a prior contract for binding arbitration, or a contract for mediation, to be followed by binding arbitration if necessary.

The reason these alternative procedures for the resolution of disputes present a more efficient alternative to the coercive litigation process is that they provide greater flexibility. With increased flexibility, the parties can more efficiently redirect themselves toward prompt resolution of the substantive dispute. They can take shortcuts, if you will, toward that resolution, each determining and protecting their own personal interest at every turn in the road. This flexibility is born of the voluntary nature of the process. Each party can agree to, or oppose, each negotiated issue depending upon whether they judge it to bring them closer to an acceptable resolution of the substantive dispute within an acceptable period of time and at an acceptable cost. In order to gain this flexibility, achieved through cooperation, the parties relinquish, in the same measure, the coercive factor in the process. If the litigators cannot negotiate a resolution of a discovery dispute, they may re-engage the deliberative process of the pending case itself, allowing a judge or magistrate to decide the dispute for them. If the parties to a pre-lawsuit mediation agreement cannot reach an acceptable mediated resolution, they can jointly agree to engage the coercive process of arbitration or can individually engage the coercive process of a lawsuit by filing a complaint. With the coercive process comes, however, the rigid procedure, potentially accompanied by a loss of cooperation even as it relates to the procedure. This loss of flexibility through loss of cooperation brings with it the risk of a longer time frame and higher transactional cost attendant to the eventual resolution of the dispute.

"Each party can agree to, or oppose, each negotiated issue depending upon whether they judge it to bring them closer to an acceptable resolution of the substantive dispute within an acceptable period of time and at an acceptable cost."

The juxtaposition of the time consuming and expensive process resulting in a coercive adjudication, with a voluntary, more timely and inexpensive process of a negotiated resolution is well recognized and can be seen daily in the criminal courts when prosecutors and defense counsel negotiate guilty pleas. The defendant has the right to a trial, resulting in a coercive adjudication of the indictment, perhaps very much in his/her favor, but at significant cost in risk, time, and money. Alternatively, the risk, duration and cost of the process can be reduced by negotiating a resolution which is undoubtedly imperfect in the eyes of the defendant, but nonetheless has the benefits of a higher degree of certainty and a quicker and less expensive end result.

5th Annual ANDRI Set for March 16

The ADR Section is proud to co-sponsor, along with the Institute for Continuing Legal Education, the 5th Annual Advanced Negotiation and Dispute Resolution Institute (ANDRI), to be held on Thursday, March 16, 2006, at the newly-expanded St. John's Conference Center in Plymouth.

This year's keynote speaker, Nina Meierding, is a national leader in the field of ADR who was just awarded the John M. Haynes Distinguished Mediator Award at the Association for Conflict Resolution's Annual Conference.

The award is presented to "prominent and internationally recognized leaders in mediation who demonstrate personal and professional commitment to finding mediation solutions to conflict while balancing therapeutic and legal perspectives."

Ms. Meierding will provide the keynote address and lead multiple sessions at the ANDRI. Her topics include:

- The Future of Our Profession
- Cross Cultural and Gender Issues in Mediation
- The Art of Apology
- Breaking Impasse and Overcoming Resistance - Advanced Strategies
- Power Imbalance

The ANDRI will again feature four tracks: Negotiation, Mediation, Arbitration, and Judicial, with dynamic sessions in each track involving judges, ADR practitioners, and advocates. The Mediation track qualifies for Advanced Mediation Training credit. Plan now to register, by visiting the ICLE web-site, www.icle.org/andr, or calling them at 877-229-4350.

Best Practices: Mediation in Florida

— by Mary A. Bedikian and William L. Weber, Jr.

Mary A. Bedikian is Professor of Law in Residence and Director of the ADR Program at Michigan State University College of Law. She also is a trained mediator and arbitrator and she is a former chair of the ADR Section of the State Bar of Michigan.

I. OVERVIEW

Since the 1970's, Florida has engaged in extensive efforts to implement ADR into every facet of its judicial system. At that time, the state began the first citizen dispute settlement center to address disputes on the neighborhood and community level.

The next important step occurred in 1986 with the creation of the Florida Dispute Resolution Center (DRC), the first statewide resource for education, training and research in ADR. Today, the DRC, along with the Florida Consortium for Conflict Resolution (CRC), are the two main ADR organizations in Florida.

A key piece of ADR legislation in Florida is the 1988 implementation of Chapter 44, Mediation Alternatives to Judicial Action, which allowed civil trial judges to refer any portion, even all, of their cases to mediation or arbitration. In the following years, the Florida Supreme Court and the DRC formed several committees (see below) that have expanded the use of mediation. Sharon Press, Director of the DRC, believes that the support and guidance of these committees have been a large part of the success of the state's programs.

In July of 2004, the state took yet another step in its efforts to make ADR available to all Floridians. Through the Constitutional Amendment Revision 7 to Article V, the state, and not each county, will pay for a minimum amount of mediation services to all areas of the state. This will further the uniformity of services available, since not all areas of the state have uniform socio-economic levels. It is legislation such as this, says Press, which illustrates Florida's forward-thinking approach to ADR and its commitment to judicial economy.

Florida also promotes an annual *"Mediation Week"* sponsored by Gov. Jeb Bush, who believes that mediation is valuable because it allows individuals to take control of their own lives and tailor solutions to their needs.

II. THE FLORIDA DISPUTE RESOLUTION CENTER (DRC).

Established in 1986 as a joint venture of the Florida Supreme Court and the Florida State University College of Law, the DRC was established by Supreme Court of Florida Chief Justice Joseph Boyd and FSU College of Law Dean Talbot "Sandy" D'Alemberte. This is the foremost ADR organization in Florida and its tasks include: assisting Florida courts in developing alternatives to traditional litigation; providing staff support to the Supreme Court of Florida mediation boards and committees; organizing the certification of mediators and mediation training programs; providing mediation training to volunteers; sponsoring an annual conference for mediators and arbitrators; and publishing a quarterly newsletter, *The Resolution*, and an annual *Compendium.*

The DRC has created five main committees to address substantive issues arising from Florida's mediation programs: (1) the Supreme Court Committee on ADR Rules and Policy provides the Supreme Court with guidance on rules and policies concerning certified mediators; (2) the Mediator Qualifications Board hears grievances against certified mediators; (3) the Mediator Ethics Advisory Committee issues advisory opinions (under Florida law) on ethical issues; the DRC newsletter, *The Resolution* Report, publishes the opinions, making the material available to practitioners; (4) the Mediation Training Review Board hears complaints filed against certified mediation training programs and providers; and (5) the Qualifications Complaint Committee reviews complaints against certified mediators.

In addition to creating these specialized committees, the DRC has set forth *Rules for Certified and Court Appointed Mediators*. These rules include general qualifications for mediators (Rule 10.100), standards of professional conduct (Rule 10.200), mediator's responsibility to the parties (Rule 10.300), mediator's responsibility to the mediation process (Rule 10.400), mediator's responsibility to the courts (Rule 10.500), mediator's responsibility to the mediation profession (Rule 10.600), discipline (Rule 10.700), good moral character and professional discipline (Rule 10.800) and the Mediator Ethics Advisory Committee. The DRC has also created *Rules for Civil Procedure for Certified and Court Appointed Mediators*.

"Through the Constitutional Amendment Revision 7 to Article V, the state, and not each county , will pay for a minimum amount of mediation services to all areas of the state."

III. THE FLORIDA CONFLICT RESOLUTION CONSORTIUM (CRC)

The Consortium was created by the Florida

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legislature in 1987 to bring consensus solutions to Florida's public problems and community disputes by efficient use of ADR methods. The focus of the CRC is efficiency, as it places emphasis on building consensus *before* disputes arise. As opposed to the DRC, which addresses ADR through the judicial system, the CRC reflects Florida's commitment to truly integrating ADR into every facet of the state, through on-going ADR approaches to public issues.

"As opposed to the DRC, which addresses ADR through the judicial system, the Conflict Resolution Consortium reflects Florida's commitment to truly integrating ADR into every facet of the state, through on-going ADR approaches to public issues."

The CRC is based out of Florida State University and serves Florida in three main ways. First, it provides ADR services and refers the public to ADR professionals. Secondly, the Consortium collaborates with state and local government officials on public policy issues. Finally, the Consortium is a resource for ADR training, education, research and evaluation services.

IV. MEDIATOR CERTIFICATION.

The Florida Academy of Professional Mediators, through the DRC, has set forth the Florida Rules for Certified and Court-Appointed Mediators.

(a) County Court Mediators. For certification a mediator of county court matters must be certified as a circuit court or family mediator or:

(1) complete a minimum of 20 hours in a training program certified by the supreme court;

(2) observe a minimum of four county court mediations conducted by a certified mediator and conduct four county court mediation conferences under the supervision and observation of a court-certified mediator; and

(3) be of good moral character.

(b) Family Mediators. For certification a mediator of family and dissolution of marriages issues must:

(1) complete a minimum of 40 hours in a family mediation training program certified by the supreme court;

(2) have a master's degree or doctorate in social work, mental health or behavioral or social sciences; be a physician certified to practice psychiatry; or be an attorney or a CPA licensed to practice in any US jurisdiction; and have at least 4 years of practical experience in one of the aforementioned fields or have 8 years family mediation experience with a minimum of 10 mediations per year;

(3) observe 2 family mediations conducted by certified family mediator and conduct 2 family mediations under the supervision and observation of a certified family mediator; and

(4) be of good moral character.

(c) Circuit Court Mediators. For certification a mediator of circuit court matters, other than family matters, must:

(1) complete a minimum of 40 hours in a certified circuit court mediation training program certified by the supreme court;

(2) be a member in good standing of The Florida Bar with at least 5 years of Florida practice and be an active member of The Florida Bar within 1 year of application for certification; or be a retired judge from any US jurisdiction who was a member in good standing of the bar in the state in which the judge presided for at least 5 years immediately preceding the year certification is sought;

(3) observe 2 circuit court mediations conducted by a certified circuit mediator and conduct 2 circuit mediations under the supervision and observation of a certified circuit court mediator; and

(4) be of good moral character.

(d) Dependency Mediators. For certification a mediator of dependency matters, as defined in Florida Rules for Juvenile Procedure 8.290(a) must:

(1) complete a supreme court certified dependency mediation training program as follows:

(a) 40 hours if the applicant is not a certified family mediator or is a certified family mediator who has not mediated at least 4 dependency cases; or

(b) 20 hours if the applicant is a certified family mediator who has mediated at least 4 dependency cases; and

(2) have a master's degree doctorate in social work, mental health, behavioral sciences or social sciences; or be a physician licensed to practice adult or child psychiatry or pediatrics; or be an attorney licensed to practice in any US jurisdiction; and

(3) have 4 yrs experience in family and/or dependency issues or be a licensed mental health professional with at least 4 years practical experience or be a certified family or circuit court mediator with a minimum of 20 mediations; and

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(4) observe 4 dependency mediations conducted by a certified dependency mediator and conduct 2 dependency mediations under the supervision and observation of a certified dependency mediator; and

(5) be of good moral character

V. CONFIDENTIALITY AND PRIVILEGE.

The current rules regarding confidentiality and privilege are found in Mediation Confidentiality and Privilege Act, Ch. 2004-291 (Committee Substitute for Senate Bill No. 1970). Effective July 1, 2004, the Act applies to any mediation (1) required by statute, court rule, agency rule or court-annexed mediation; (2) conducted under the Act by express agreement of the parties; and (3) facilitated by a mediator certified by the Supreme Court (unless the parties expressly agree that the Act's provisions shall not apply to the mediation).

Key portions of this act state include:

Fla. Stat. 44.107. Immunity for arbitrators, mediators and mediator trainees.

For court-ordered mediation, all written communications in mediation, other than the executed settlement agreement, are confidential and inadmissible. Further, mediators and arbitrators have judicial immunity as long as the mediation is: required by statute, conducted under express agreement of the parties, facilitated by the Supreme Court (unless parties expressly agree not to be bound) and the mediator does not engage in bad faith or malicious purpose, or exhibits wanton behavior or acts with willful disregard of human safety.

Fla. Stat. 44.405. Confidentiality; privilege; exceptions.

All mediation communications shall be confidential, except those communications to another mediation participant or a participants' counsel. A party to mediation has a privilege to refuse to testify and to prevent another from testifying in a subsequent proceeding regarding mediation.

If, in a mediation involving more than two parties, a party gives written notice that it is terminating the mediation, the terminating party shall have a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding only those mediation communications occurring prior to delivery of the notice.

There is no confidentiality or privilege attached to a signed written agreement reached during mediation, *unless the parties agree otherwise, or for any mediation communication:* (1) for which confidentiality or privilege has been waived by all parties; (2) willfully used to plan, commit, attempt or perpetuate criminal activity (3) that requires a mandatory government report; (4) offered to report, prove or disprove professional malpractice occurring mediation; (5) offered for the limited purpose of establishing or refusing legally recognized grounds for voiding or altering a settlement agreement reached during mediation; (6) offered to report, prove or disprove professional misconduct occurring during the mediation.

A mediation communication disclosed in any of the above manners remains confidential and is not discoverable or admissible for any other purpose. Information otherwise admissible or subject to discovery does not become inadmissible or protected from discovery by reason of its disclosure or use in mediation.

A party that discloses or makes a representation about a privileged mediation communication waives that privilege, but only to the extent necessary for the other party to respond to the disclosure or representation.

Fla.Sta .44.406. Confidentiality; civil remedies.

Any mediation participant who knowingly and willfully discloses a mediation communication shall be subject to remedies, including equitable relief, compensatory damages, attorney's fees, mediator's fees and costs and costs incurred in the application for remedies. The statute of limitations for a breach of confidentiality cause of actions is 2 years after the date on which the party had a constructive knowledge to discover the breach, but no more than 4 years after the date of that breach.

FLa.Sta.61.183. Mediation of certain contested issues.

Any information from the files, reports, case summaries, mediator's notes or other communications or material relating to mediation is exempt from public disclosure laws.

VI. CONCLUSIONS.

According to Sharon Press, Director of the Florida Dispute Resolution Center, the key to Florida's success has been a progressive approach to implementing ADR into the judicial system. Rules and laws are constantly being evaluated and updated to assure relevant issues are dealt with as they arise.

A large part of the success of Florida's mediation program is its sheer pervasiveness. As of June 2004,

Mr. Weber has been engaged in the practice of law for over 40 years. He was an antitrust lawyer for the FTC in Washington, D.C. and a former Assistant General Counsel for General Motors Legal Staff. He currently is of counsel to the law firm of Daniels & Kaplan, P.C. and specializes in arbitration and mediation with offices in Bloomfield Hills, Michigan. Mr. Weber is on the Oakland County Bar Association list of approved mediators and is member of the Board of Directors of the Dispute Resolution Association of Michigan. He taught ADR at Thomas M. Cooley Law School during 2001-2002.

"Rules and laws are constantly being evaluated and updated to assure relevant issues are dealt with as they arise."

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there were:

- 9 Citizen Dispute Settlement programs
- 42 County Mediation programs (serving all 20 circuits)
- 22 Family Mediation programs
- 9 Circuit Civil Mediation programs
- 20 Dependency Mediation programs
- 3 Arbitration programs
- 1 Appellate Mediation program.

The budgets for these programs vary from zero to more than a million dollars. As of June 2004, 16,500 individuals had completed a mediation-training program certified by Supreme Court of Florida. There are currently 1,369 county mediators, 1,675 family mediators, 2,166 circuit mediators and 138 dependency mediators certified by the Supreme Court of Florida. Press believes these substantial numbers derive from the Florida Supreme Court's enthusiastic endorsement of mediation programs. Clearly, these numbers illustrate that Florida has made extensive and consistent efforts to further ADR. By having a truly pervasive and grassroots-based mediation plan, Florida has made mediation available to all its citizens.

Upcoming Mediation Trainings

General Civil

The following 40-hour mediation trainings have been approved by SCAO to fulfill the requirements of MCR 2.411(F)(2)(a):

Lansing: **March 9-11, March 31-April 1, 2006**

Training sponsored by Dispute Resolution Center

Contact: Karen Beauregard, 517-485-2274, drccm.beauregard@tds.net

Plymouth: **April 20-22, May 12-13, 2006**

Training sponsored by Institute for Continuing Legal Education

Register online at www.icle.org/mediation, or call 1-877-229-4350.

Domestic Relations

The following 40-hour mediation trainings have been approved by SCAO to fulfill the requirements of MCR 3.216(G)(1)(b):

Ann Arbor: **November 30, December 1-2, 7- 8**

Training sponsored by Mediation Training and Consultation Institute

Register online at www.learn2mediate.com, or call 1-800-535-1155

Plymouth: **January 24-29, 2006**

Training sponsored by Institute for Continuing Legal Education

Register online at www.icle.org/mediation, or call 1-877-229-4350.

Bloomfield Hills: **April 10-11, 13, 25, 27, 2006**

Training sponsored by Oakland Mediation Center

Contact: Gina Buckley, 248-338-4280, www.mediation-omc.org

Advanced Mediation Training

Mediators on court rosters are required to obtain 8 hours of advanced mediation training every two years. MCR 2.411(F)(4); MCR 3.216(G)(3).

Troy: **December 1, 2005,** 8:30 am – 6 pm

"Mindfulness Mediation," Daniel Bowling

Training sponsored by Oakland Mediation Center

Contact: Gina Buckley, 248-338-4280, www.mediation-omc.org

Bloomfield Hills: **January 23, 2006,** 8:30 am – 6 pm

"The Heart of Conflict Resolution," Bernie Mayer

Training sponsored by Oakland Mediation Center

Contact: Gina Buckley, 248-338-4280, www.mediation-omc.org

Lansing: **February 17, 2006,** 8:30 am – 12:30 pm

"10 Ways Mediators Could Get Sued," Anne Bachle Fifer

Training sponsored by Dispute Resolution Center

Contact: Karen Beauregard, 517-485-2274, drccm.beauregard@tds.net

Lansing: **May 19, 2006,** 8:30 am – 12:30 pm

Training sponsored by Dispute Resolution Center

Contact: Karen Beauregard, 517-485-2274, drccm.beauregard@tds.net

Bloomfield Hills: **June 8, 2006,** 8:30 am – 6 pm

"Re-visiting the Facilitative Model," Harvey Burdick & Jean Goddard

Training sponsored by Oakland Mediation Center

Contact: Gina Buckley, 248-338-4280, www.mediation-omc.org

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Ask the Neutral: Is My Brother's Mediator a Keeper?

Dear Neutral,

Is it good practice for me to accept opposing counsel's recommendation for a mediator, even if I don't know or don't like that mediator, on the theory that we're more likely to settle if opposing counsel is happy with the mediator?

From, Uncertain About my Brother's Mediator

Dear Brother:

One bit of conventional wisdom about mediation is that if you agree to your opponent's selection of a mediator, you and your client enhance the chances that the mediation will be successful. The question is whether this is true. The theory is that your opponent will naturally be more receptive to the efforts of a mediator of his or her choosing. Therefore, the mediator's unfavorable view of a claim or defense, value of the case, or suggestion of compromise would be more favorably received, not only increasing the likelihood of a successful mediation, but perhaps also achieving a result more favorable to your client than could have been achieved with a mediator selected by compromise, or one of your choosing.

Empirical evidence on this topic does not appear to exist. However, experience suggests that, for the quintessential facilitative mediation, where both parties come voluntarily to the table with a view to achieving a compromise, it is doubtful that accepting your opponent's selection alone would have a determinative effect on the likelihood of success. Rather, in such circumstances it would seem to be much more important to focus on the proposed mediator's experience and skill than on who proposed him or her.

In other cases, such as a mediation where, at the end of the day, the parties are going to ask the mediator to evaluate the claims and defenses, giving significant weight to the fact that your opponent made the selection could even be counter-productive. Presumably, the other party would select and propose a mediator that shares that party's orientation on the world. That orientation may produce an evaluation that is anathema to your client. And if it doesn't, there is a risk the other way, that the result may fall so far short of the proposing party's expectations that he or she rejects the result, and the effort is largely wasted.

From a mediator's point of view, it should make no difference who nominates the mediator. As a mediator, one presumes that both parties want the same thing, a neutral moderator who, through skillful diplomacy, can bring the parties together. The mediator is sworn to neutrality and confidentiality, and experience shows that, by and large, mediators take these charges seriously and fulfill them diligently. Accordingly, from the mediator's chair, which party is his or her proponent should have little or no effect on the outcome.

One situation in which keeping your brother's mediator selection may make a significant difference, however, is when you are faced with a reluctant or even hostile participant on the other side, and it is either a particularly good case or a particularly bad case for your client. If it is also mandatory mediation, then the urge to simply accept your opponent's suggestion may be very strong indeed. In these circumstances, it would be reasonable to give greater weight to the factor of who proposes the mediator than in other circumstances. This is because if, given a choice, your opponent wouldn't even be there, but you really want the process to work, then in order to give it every chance to work, you might allow your opponent the mediator of his or her choice. To do so gives the reluctant party a stake in the process and lets him or her "win" before stepping into the mediation room.

Even so, caution against letting this factor be determinative of mediator selection is still warranted. A biased or prejudiced mediator can cause unintended consequences, as discussed above. And, if you are on the receiving end of such magnanimity, it would probably be a good guess that the opponent who cavalierly takes your proposed mediator has nonetheless done the sort of calculus outlined above. Mediators like to think that it is their skill and reputation for fairness that serves as the basis for their selection, and that should remain the guiding principle for parties engaged in mediator selection. So keep your brother's mediator only after thoughtful deliberation.

Michael Coakley

The ADR Newsletter

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